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# Comments

## *The Act of State Doctrine: A History of Judicial Limitations and Exceptions*

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In 1964, the United States Supreme Court in *Banco Nacional de Cuba v. Sabbatino*[1] held that United States courts may not examine the validity of a taking of property by a recognized foreign sovereign[2] within its own territory, even when the taking constitutes a violation of international law.[3] Despite this holding and subsequent legislation,[4]

1. 376 U.S. 398 (1964).

2. Recognition for purposes of the act of state doctrine is not necessarily coterminous with political recognition by the government of the United States. In [redacted], 168 U.S. 250 (1897), where the plaintiff sought recovery for detention in Venezuela caused by a revolutionary force's refusal to grant him a passport, the Court stated that the doctrine "must necessarily extend to agents of governments ruling by paramount force as matters of fact." *Id.* at 252. For material dealing with the acts of unrecognized governments, see note 73 *infra*.

3. In *Sabbatino*, Justice Harlan, writing for the majority, initially quoted the classic statement of the act of state doctrine from Underhill v. Hernandez, 168 U.S. at 252:

> Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed by sovereign powers as between themselves.

376 U.S. at 416.

He described the act of state doctrine as "a principle of decision binding on federal and state courts alike but compelled by neither international law nor the Constitution." 376 U.S. at 427. In so doing, the *Sabbatino* opinion backed away from earlier dicta to the effect that the doctrine is founded on respect for foreign sovereignty, *e.g.*, American Banana v. United Fruit Co., 213 U.S. 347, 358 (1909); or considerations of international comity, *e.g.*, Oetjen v. Central Leather Co., 246 U.S. 297, 303–04 (1918). Justice Harlan also qualified the latter's statement that the conduct of foreign relations is committed to the Executive and Congress, 246 U.S. at 302, by quoting Baker v. Carr, 369 U.S. 186, 211 (1962), that it cannot be thought that "every case or controversy which touches foreign relations lies beyond judicial cognizance." 376 U.S. at 423.

Nevertheless, Justice Harlan wrote that the act of state doctrine does have "'constitutional' underpinnings," *id.*, based on "the proper distribution of functions between the judicial and political branches of the Government on matters bearing upon foreign affairs."

*Id.* at 427–28. For the best discussions of *Sabbatino* as a development of federal common law, see Henkin, *The Foreign Affairs Power of the Federal Courts:* Sabbatino, 64 COLUM. L. REV. 805 (1964); Hill, *The Law-Making Power of the Federal Courts: Constitutional Preemption*, 67 COLUM. L. REV. 1024 (1967). Justice Harlan then proceeded to examine policy justifications for the doctrine, emphasizing the greater resources of the Executive in international disputes and illustrating that judicial intervention could embarrass the Executive. 376 U.S. at 431–33. He also wrote that restricting the doctrine would render titles uncertain in foreign commerce. *Id.* at 433–34.

Much of the significance of *Sabbatino* lies in its consideration of whether United States courts may examine the legality of foreign acts under international law. [redacted] from the implications of earlier cases, particularly Oetjen v. Central Leather Co., 246 U.S. 297, 304 (1918) and Shapleigh v. Mier, 299 U.S. 468, 471 (1937), that such an examination could never take place. Instead he identified a series of considerations to be weighed in each case. Justification for such a review strengthens the greater the degree of codification or consensus concerning a particular area of international law and the lesser the implications for United States foreign relations. 376 U.S. at 428. *See* R. FALK, THE ROLE OF DOMESTIC COURTS IN THE INTERNATIONAL LEGAL ORDER (1964). Alluding to the *Bernstein* litigation, p. 688–89 and note 58 *infra*, Justice Harlan also noted that "the balance of relevant considerations" may be shifted by the subsequent dissolution of the foreign government since the political interest of the United States may be altered. 376 U.S. at 428. In addition, he appeared to recognize an exception to the doctrine when "a treaty or other unambiguous agreement" controls the legal principles of a claim before the court. *Id.* For discussion of this exception, see United States v. Pink, 315 U.S. 203 (1942); United States v. Belmont, 301 U.S. 324 (1937). Finally, Justice Harlan implied that the act of state doctrine need not be automatically applied to the acts of states not recognized by this country. 376 U.S. at 428. For discussion of this point, see p. 690 and note 73 *infra*.

Justice Harlan found that there existed no international consensus on the limitations on a state's power to expropriate the property of aliens and that this disagreement reflected a basic divergence between the national interests of capital-importing and capital-exporting nations and between the ideologies of socialist and capitalist systems. *Id.* at 429–30. In light of this fundamental disagreement, the Court refused to examine the validity under international law of a Cuban expropriation of property belonging to a United States-controlled corporation. *Id.* at 428.

In dissent, Justice White criticized, *inter alia*, the Court's use of past precedents, its subordination of the rights of individual litigants, its reliance on the Executive for remedies, and its use of international law in the field of expropriation. *Id.* at 439-72 (White, J., dissenting).

The *Sabbatino* case provoked a scholarly outpouring. *E.g.*, BACKGROUND PAPERS AND PROCEEDINGS OF THE SEVENTH HAMMARSKJÖLD FORUM: THE AFTERMATH OF SABBATINO (1965) [hereinafter cited as THE AFTERMATH]; E. MOONEY, FOREIGN SEIZURES: SABBATINO AND THE ACT OF STATE DOCTRINE (1967).

For commentaries written while the *Sabbatino* litigation was in progress, see R. FALK, *supra;* Coerper, *The Act of State Doctrine in Light of the* Sabbatino *Case*, 56 AM. J. INT'L L. 143 (1962); Metzger, *The Act of State Doctrine and Foreign Relations*, 23 U. PITT. L. REV. 881 (1962); Stevenson, *The* Sabbatino *Case — 3 Steps Forward and 2 Steps Back*, 57 AM. J. INT'L L. 97 (1963); Comment, *The Act of State Doctrine — Its Relation to Private and Public International Law*, 62 COLUM. L. REV. 1278 (1962).

For works written in light of the Supreme Court's decision, see R. LILLICH, THE PROTECTION OF FOREIGN INVESTMENT: SIX PROCEDURAL STUDIES 45–116 (1965); Collinson, Sabbatino: *The Treatment of International Law in United States Courts*, 3 COLUM. J. TRANSNAT'L L. 27 (1964); Falk, *The Complexity of* Sabbatino, 58 AM. J. INT'L L. 935 (1964); Friedmann, *National Courts and the International Legal Order: Projections on the Implications of the Sabbatino Case*, 34 GEO. WASH. L. REV. 443 (1966); Laylin, *Does Failure to Pay Compensation for Expropriated Property Come Within the Act of State Doctrine?*, 66 AM. J. INT'L L. 823 (1972); Laylin, *Justiciable Disputes Involving Acts of*

*State*, 7 INT'L LAW. 513 (1973); Lillich, *The Proper Role of Domestic Courts in the International Legal Order*, 11 VA. J. INT'L L. 9, 28–37 (1970); Metzger, *The Act of State Doctrine Refined: The* Sabbatino *Case*, 1964 SUP. CT. REV. 223; Reeves, *The Sabbatino Case and the Sabbatino Amendment: Comedy — or Tragedy — of Errors*, 20 VAND. L. REV. 429 (1967); Reeves, *The* Sabbatino *Case: The Supreme Court of the United States Rejects a Proposed New Theory of Sovereign Relations and Restores the Act of State Doctrine*, 32 FORD. L. REV. 631 (1964); Stevenson, *The State Department and* Sabbatino — *"Even Victors Are by Their Own Victories Undone,"* 58 AM. J. INT'L L. 707 (1964); Swan, *Act of State at Bay: A Plea on Behalf of the Elusive Doctrine*, 1976 DUKE L.J. 807; *Responses to* Sabbatino, 5 HARV. INT'L L. CLUB J. 209 (1964).

For general writings on act of state before the *Sabbatino* litigation, see Committee on International Law, The Association of the Bar of the City of New York, *A Reconsideration of the Act of State Doctrine in United States Courts* (1959); Hyde, *The Act of State Doctrine and the Rule of Law*, 53 AM. J. INT'L L. 635 (1959); Reeves, *The Act of State Doctrine and the Rule of Law — A Reply*, 54 AM. J. INT'L L. 141 (1960); Zander, *The Act of State Doctrine*, 53 AM. J. INT'L L. 826 (1959).

4. Congress sought to neutralize *Sabbatino* by enacting the Sabbatino amendment to the Foreign Assistance Act of 1964, 22 U.S.C. § 2370(e)(2) (1970 & Supp. V 1975), which provides generally that:

> Notwithstanding any other provision of law, [redacted] the United States shall [redacted] on the ground of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law in a case in which a claim of title or other rights to property is asserted . . . based upon (or traced through) a confiscation . . . by an act of state in the principles of international law, including the principles of compensation and the other standards set out in this subsection. . . .

The statute exempted certain cases including those "with respect to which the President determines that application of the act of state doctrine is required in that particular case by the foreign policy interests of the United States and a suggestion to that effect is filed on his behalf in that case with the court." *Id.*

The compensation standards referred to are found in the original Hickenlooper Amendment to the Foreign Assistance Act of 1964, 22 U.S.C. § 2370(e)(1) (1976 & Supp. V 1975), which suspends foreign assistance to governments expropriating United States property without taking specified steps "to discharge its obligations under international law . . . including speedy compensation for such property in convertible foreign exchange, equivalent to the full value thereof, as required by international law. . . ."

[redacted] Banco Nacional de Cuba v. First National City Bank, 431 F.2d 394 (2d Cir. 1970), *rev'd on other grounds*, 406 U.S. 759 (1972); French v. Banco Nacional de Cuba, 23 N.Y.2d 46, 242 N.E.2d 704, 295 N.Y.S.2d 443 (1968). [redacted] F. Palicio y Compañía, S.A. v. Brush, 256 F. Supp. 481, 489 (S.D.N.Y.), *aff'd mem.*, 375 F.2d 1101 (2d Cir. 1966), *cert. denied*, 389 U.S. 830 (1967).

For discussions of various aspects of the amendment, see Banco Nacional de Cuba v. Farr, 243 F. Supp. 957, 971–79 (S.D.N.Y. 1965), *aff'd*, 383 F.2d 166, 180–83 (2d Cir. 1967) (upholding its constitutionality); THE AFTERMATH, *supra* note 3, at 35–45; Bleicher, *The Sabbatino Amendment in Court: Bitter Fruit*, 20 STAN. L. REV. 858 (1968); Cardozo, *Congress Versus* Sabbatino: *Constitutional Considerations*, 4 COLUM. J. TRANSNAT'L L. 297 (1966); Henkin, *Act of State Today: Recollections in Tranquility*, 6 COLUM. J. TRANSNAT'L L. 175 (1967); Lowenfeld, *The Sabbatino Amendment — International Law Meets Civil Procedure*, 59 AM. J. INT'L L. 899 (1965); Reeves, *The Sabbatino Case and the Sabbatino Amendment: Comedy — or Tragedy — of Errors*, 20 VAND. L. REV. 429 (1967).

uncertainty has existed over limitations and exceptions to this rule which is the keystone of the modern act of state doctrine.

Since *Sabbatino,* increasingly complex act of state cases have confronted the courts with a series of difficult problems. Courts have limited the act of state doctrine by strictly requiring evidence of a public act and by finding the situs of confiscated property to be outside a foreign state's territory. [redacted] broad exceptions to the act of state doctrine: the first, the *Bernstein* doctrine, would force judicial deference to State Department determinations of the appropriateness of the examination of the validity of foreign takings; the second would exclude all commercial acts from the doctrine; and the third would make the doctrine inapplicable to set-offs and affirmative recoveries arising out of suits initiated by foreign sovereigns in United States courts.

The recent treatment of these problems goes to the core of the act of state doctrine and largely illustrates a judicial dissatisfaction with the implications of *Sabbatino.* This comment will examine the present status of these attempts to restrict the doctrine and explore the advisability of so cutting back on *Sabbatino.*

### *Limitation Through the Public Act Requirement*

It is axiomatic that the act of state doctrine can only be applied to an act of a foreign government, not to the private conduct of foreign individuals.[5] Before the 1976 case of *Alfred Dunhill of London, Inc. v. Republic of Cuba,*[6] the Supreme Court had never faced the evidentiary problem of whether a particular act was attributable to a regime claiming sovereign authority.[7] In *Dunhill,* however, the Court refused to apply the act of state doctrine by finding that the act in question did not fit the definition of a "public act of those with authority to exercise sovereign powers."[8]

The facts of the *Dunhill* litigation were unique. The Cuban government had taken the property of the five leading manufacturers of Havana cigars.[9] Agents, called "interventors," were appointed by the

5. Almost by definition, an act of state must be an exercise of foreign governmental power. Ricaud v. American Metal Co., 246 U.S. at 310; Underhill v. Hernandez, 168 U.S. at 252.

6. 425 U.S. 682 (1976). *See* 18 HARV. INT'L L.J. 187 (1977); *The Supreme Court, 1975 Term,* 90 HARV. L. REV. 56, 265–75 (1976).

7. The evidentiary problem in *Dunhill* is to be distinguished from that of *Underhill* and *Ricaud* where the Court had to decide whether to treat revolutionary forces as they would legitimate foreign sovereigns. *See* note 3 *supra.*

8. 425 U.S. at 694.

9. The five Cuban companies were F. Palicio y Compañía, S.A; Tabacalera Jose L. Piedra, S.A.; Por Larranga, S.A.; Cifuentes y Compañía; and Menendez, Garcia y Compañía, Ltd.

Cuban government to take possession of and operate the seized concerns.[10] Prior to the taking, referred to by Cuba as the "intervention," three importers[11] had received cigars for which payment had not been made. After the intervention, the importers paid the interventors for these pre-intervention shipments. Additional shipments were received by the importers after the intervention, but payments were withheld and a legal battle over the rights to both pre- and post-intervention payments ensued between the former owners of the seized businesses, the importers, and the interventors.[12] In court, counsel representing the interventors and the Cuban government repudiated any obligation to return the payments for the pre-intervention shipments and argued that the retention of these sums by the interventors constituted an act of state which could not be examined by United States courts.[13]

The Supreme Court, by a 5-4 majority,[14] rejected this argument and ruled that the interventors had an obligation to return the amounts that had been paid them for the pre-intervention shipments. [redacted] the [redacted] Circuit below, the Court placed the burden of proving the existence of the act of state upon the interventors.[15] Justice White, writing for the majority, found no evidence that the interventors had been vested with sovereign authority to repudiate the debts incurred in their

10. Intervention does not involve a transfer of title to the Cuban government but vests complete control of the property in government-appointed "interventors" who are agents of the Cuban government. F. Palicio y Compañía, S.A. v. Brush, 256 F. Supp. 481, 484 (S.D.N.Y.), *aff'd mem.*, 375 F.2d 1011 (2d Cir. 1966), *cert. denied*, 389 U.S. 830 (1967).

11. The importers involved were Alfred Dunhill of London, Inc., Saks & Co., and Faber, Coe & Gregg, Inc.

12. The former owners, who had fled to the United States after their businesses had been taken over, brought suit against the importers for trademark infringement and for the proceeds from sales of any cigars which bore trademarks claimed to be the property of the former owners. The interventors and the Republic of Cuba instigated separate litigation to enjoin the former owners' counsel from pursuing the actions in the firms' names. A district court ruled as a preliminary matter that the interventors and not the former owners were entitled to sue for payment for the post-intervention shipments, and the actions were consolidated for trial. F. Palicio y Compañía, S.A. v. Brush, 256 F. Supp. 481 (S.D.N.Y.), *aff'd mem.*, 375 F.2d 1011 (2d Cir. 1966), *cert. denied*, 389 U.S. 830 (1967).

13. In his closing argument before the district court, counsel for the interventors stated: "The Cuban government took this money [which had been mistakenly paid to them for the pre-intervention shipments] and under the act of state doctrine it belongs to the Cuban government." 425 U.S. at 691 n.3.

14. *Id.* at 682. Justice White's opinion was joined by Chief Justice Burger and Justices Powell and Rehnquist. Justice Stevens concurred only in that part of the opinion finding that the interventors' repudiation was not an exercise of Cuba's sovereign power. Justices Brennan, Stewart, Marshall, and Blackmun dissented.

15. *Id.* at 691. The court of appeals had held that "in the absence of evidence that the interventors were *not* acting within the scope of their authority as agents of the Cuban government, their repudiation was an act of state even though not embodied in a formal decree." Menendez v. Saks & Co., 485 F.2d 1355, 1371 (2d Cir. 1973) (emphasis added).

business.[16] Citing an obscure sovereign immunity case,[17] he wrote that one who is vested by a foreign government with commercial authority cannot be assumed to possess sovereign authority.[18] Thus, the Court held that the interventors' repudiation was not an act of state, but represented nothing more than a continued assertion of a superior right to the pre-intervention accounts receivable.[19] The majority also rejected the possibility that the statements made by counsel for the interventors and for Cuba constituted an act of state.[20]

In dissent, Justice Marshall argued that while the statements of counsel were not themselves an act of state, as authoritative representations of the position of interventors and the Republic of Cuba, they confirmed that the retention of the pre-intervention payments had been undertaken as an exercise of sovereign power.[21] Examining past precedents, he found that the act of state doctrine did not require a formal action or declaration by the foreign state.[22] Justice Marshall concluded that "[u]nder any realistic view of the facts of this case, . . . the interventors' retention of and refusal to return funds paid to them by Dunhill constitute an act of state. . . ."[23]

The *Dunhill* case presented the Court with an unusual fact situation. Unlike previous act of state cases which involved official acts[24] such as foreign legislation or executive proclamations, or military actions such as personal detentions and seizures of property,[25] *Dunhill* involved a non-action by a commercial agency coupled with the in-court representations of the foreign sovereign's counsel. It is apparent that a court cannot be bound by a party's mere allegation that an act of state has indeed taken place; some examination of whether the act was a "public

16. "No statute, decree, order, or resolution of the Cuban Government *itself* was offered in evidence indicating that Cuba had repudiated her obligations in general or any class thereof or that it had as a *sovereign matter* determined to confiscate the amounts due three foreign importers." 425 U.S. at 695 (emphasis added).

17. The "Gul Djemal," 264 U.S. 90 (1924).

18. 425 U.S. at 693–94.

19. *Id.* at 694–95.

20. The majority drew attention to the context of the counsel's statement: "The statement was made during counsel's closing argument in the District Court and is not and does not purport to be a *factual* representation that a[n] . . . act of state occurred." *Id.* at 691 n.8 (emphasis in opinion).

21.

> The above-quoted statements of counsel are not themselves acts of state. But as authoritative representations of the position of counsel's clients, the interventors and the Republic of Cuba, with respect to the monies in their possession, these statements do serve to confirm that the continued retention of those monies has been undertaken as an exercise of sovereign power.

*Id.* at 723 (Marshall, J., dissenting).

22. *Id.* at 719–20.

23. *Id.* at 716.

24. *Sabbatino* is, of course, the best example of such a case. *Dunhill* and *Ricaud* are examples of cases involving such military action.

act of those with authority to exercise sovereign authority"[26] is necessary. Such an examination of the act itself does not imply that United States courts have the power to rule on the legality of the action if indeed it is an act of state. [redacted] is undisturbed. Nevertheless, by imposing a stringent burden of proof upon those alleging the existence of an act of state, the Court involves the judiciary more deeply in the conduct of foreign sovereigns and increases the possibility of affronting them. Yet, while these results are seemingly incompatible with the goals of the act of state doctrine, this problem is probably of negligible practical importance since it is likely that *Dunhill*'s tightening of the public act requirement will simply lead foreign states to undertake future actions in a more formal manner.

### *Limitation Through the Situs Requirement*

The protection afforded by the act of state doctrine applies only to a foreign sovereign's exercise of power over property within its own territory.[27] Confiscation decrees affecting property outside its territory have been enforced by United States courts only to the extent that they do not offend the public policy of the forum[28] and are thus rarely upheld.[29] Since *Sabbatino*, courts have determined the situs of confiscated intangible assets to be outside the sovereign's territory so as to preclude giving legal effect to their confiscation.

After *Sabbatino*, the question of the situs of intangible property was first addressed in *Republic of Iraq v. First National City Bank* by the second circuit.[30] The litigation resulted from a struggle for control of the estate of King Faisal II following his death in the 1958 revolution in Iraq. The new government of Iraq, pursuant to a confiscation decree, sought to recover certain assets held by a New York bank as administrator of the King's estate. In refusing to give effect to the decree, the court held that the assets in the possession of the bank could not "realistically be considered as being within Iraq simply because King Faisal resided and was physically present there at the time of his death."[31] The situs of the assets was found to be New York, and the court refused to enforce the decree on policy grounds, noting the historical

26. 425 U.S. at 694.

27. Banco Nacional de Cuba v. Sabbatino, 376 U.S. at 401, 428, 432; A. EHRENZWEIG, CONFLICTS OF LAWS § 48(b)(1) (1962); Kirgis, *Act of State Exceptions and Choice of Law*, 44 COLO. L. REV. 173 (1972). The territorial limitation to the act of state doctrine has its source in the classic statement of *Underhill*. *See* note 3 *supra*.

28. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 46 (1965).

29. *See, e.g.*, Republic of Iraq v. First National City Bank, 353 F.2d 47, 51 (2d Cir. 1965).

30. 353 F.2d 47 (2d Cir. 1965).

31. *Id.* at 51.

anathema in the United States to confiscation without compensation.[32] The court, however, left open the question of the independent importance to be attached to the lack of jurisdiction of Iraq over the bank since this issue was not directly presented.[33]

Subsequently in *Menendez v. Saks & Co.*,[34] the lower court *Dunhill* opinion, the Second Circuit found the United States to be the situs of the importer's obligation to pay the former cigar company owners for the pre-intervention shipments and Cuba to be the situs of the interventors' obligation to return the amounts mistakenly paid them for those shipments. These results are consistent with the rule of *Harris v. Balk*[35] that the location of a simple debt, represented by a negotiable instrument, corresponds to wherever the debtor can be found and served with process. In dictum, however, the court noted that situs may be affected by whether the foreign sovereign had jurisdiction over the person in possession of the disputed property:

> For purposes of the act of state doctrine a debt is not "located" within a foreign state unless that state had the power to enforce or collect it. . . . In the absence of any showing that the importers or their agents were present in Cuba or subject to the jurisdiction of Cuban courts at the time of the intervention, we are persuaded by the reasoning of *Republic of Iraq* that no legal effect should be accorded to Cuba's purported confiscation of the importers' debts to the owners.[36]

In two subsequent cases, plaintiffs acting for foreign sovereigns used the language of *Menendez* to argue that the situs of accounts receivable was within the foreign sovereign's territory where that country had jurisdiction over the debtors. These cases concerned the rights of the former owners of Bangladesh jute mills to debts arising out of pre-

32. Judge Friendly observed:

> Foreigners entrusting their property to custodians in this country are entitled to expect this historic policy [anathema to confiscation without compensation] to be followed save when the weightiest of reasons call for a departure. . . . [T]he policy of the United States is that there is no such thing as a "good" confiscation by legislative decree.

*Id.* at 52.

33. "[I]n the absence of any showing that Irving Trust had an office in Iraq or would be in any way answerable to its courts, we need not consider whether the conclusion would differ if it did." *Id.* at 51.

34. 485 F.2d 1355 (2d Cir. 1970), *rev'd on other grounds sub nom.* Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 (1976).

35. 198 U.S. 215 (1904), *overruled in part,* Shaffer v. Heitner, 97 S. Ct. 2569 (1977). *Shaffer* overruled that part of *Harris* which held that jurisdiction could always be obtained through attachment of a defendant's intangible property in the forum state. In light of *Shaffer,* attachment of any type of property will not form the basis for jurisdiction unless the "minimum contacts" test of International Shoe Co. v. Washington, 326 U.S. 310 (1945), is met.

36. 485 F.2d at 1364–65.

nationalization sales to United States importers. The plaintiffs, new government-sponsored interests, argued that because the importers and the United States banks through which the debts were to be satisfied were subject to the jurisdiction of Bangladesh courts, the act of state doctrine barred review by United States courts. Nevertheless, in *United Bank Ltd. v. Cosmic International*,[37] a New York district court found the location of the debtor to be conclusive and determined that the situs of the debt was New York. The district court, noting the similarity between the facts of this case and those of *Menendez*, refused to accept the implication that the *Menendez* dictum would contravene the *Harris* rule. The district court also noted that the Second Circuit had not indicated just what effect foreign jurisdiction would have.[38] In a similar case, *Rupali Bank v. Provident National Bank*,[39] a Pennsylvania district court found it necessary to hold affirmatively that Bangladesh lacked jurisdiction over the defendant in order to escape any possible implications of the *Menendez* dictum, despite having established the situs of the property involved to be the United States.[40]

Dictum in the appeal of *United Bank Ltd.*[41] put to rest the question of the possible extension of the act of state doctrine whenever the foreign state has jurisdiction over the defendant. The Second Circuit cited with approval the lower court's presumption that the language of *Menendez* was not intended to overrule the longstanding situs rule set out in *Harris*. In dismissing jurisdiction as a basis for overruling situs determination, Judge Coffrin summarized:

> [S]ince jurisdictional determinations would inevitably require American courts to engage in complex interpretations of foreign statutory and case law pertaining to jurisdiction, resolving situs questions on such a basis would deprive the act of state doctrine of certainty and predictability.[42]

The court reaffirmed the territorial limitation set out in *Republic of Iraq*, endorsed its subsequent development in several Fifth Circuit cases,[43] and emphasized the first portion of the *Menendez* dictum

37. 392 F. Supp. 262 (S.D.N.Y. 1975), *aff'd in part, remanded in part on other grounds*, 542 F.2d 868 (2d Cir. 1976).

38. The court noted, in addition, that, while not necessary to their holding, courts of Bangladesh would probably not have jurisdiction over the defendants. 392 F. Supp. at 269. The circuit court subsequently concurred on this point. 542 F.2d at 873.

39. 403 F. Supp. 1285 (E.D. Pa. 1975).

40. *Id.* at 1291.

41. 542 F.2d 868 (2d Cir. 1976).

42. *Id.* at 874. It is probable that the original reference to jurisdiction in the *Menendez* dictum meant only that the power to enforce payment of a debt generally depends on jurisdiction over the person of the debtor; *i.e.*, jurisdiction is a necessary condition for enforcement, but alone not a sufficient one. 485 F.2d at 1365.

43. Maltina Corp. v. Cawy Bottling Co., 462 F.2d 1021 (5th Cir.), *cert. denied*, 409

requiring the power to enforce collection of the debt within the foreign state.

In attempting to avoid the application of the act of state doctrine, courts have faced the problem of dealing with traditional rules which assign a fictitious situs to intangibles which inherently "have no actual territorial situs."[44] The possibility of finding situs within the foreign state by the application of traditional jurisdictional rules[45] in act of state cases is rendered of only theoretical importance, however, when courts can and do apply the overriding territorial limitation to the act of state doctrine, coupled with the public policy test for extraterritorial enforcement. Thus under *Republic of Iraq*, a foreign sovereign is limited in its reach to the physical assets within its territory and while it may theoretically attempt to reach the intangible property of an individual or entity over which it has jurisdiction, the territorial limitation acts as a bar to enforcement.[46]

This interpretation is supported by the opinion of the Fifth Circuit in *Maltina Corporation v. Cawy Bottling Co.*,[47] a trademark case. In *Maltina* the circuit court reversed a district court finding that the act of state doctrine extended to extinguish trademarks registered in the

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U.S. 1060 (1972); Tabacalera Serveriano Jorge, S.A. v. Standard Cigar Co., 392 F.2d 706 (5th Cir. 1968).

44. Farmers Loan & Trust Co. v. Minnesota, 280 U.S. 204, 211 (1929). The Fifth Circuit echoed this concern:

> The situs of intangible property is about as intangible a concept as is known to the law. The situs may be in one place for ad valorem tax purposes [citing *Farmer's Loan & Trust*]; it may be in another place for venue purposes, i.e., garnishment; it may be in more than one place for tax purposes in certain circumstances; it may be in still a different place when the need for establishing its true situs is to determine whether an overriding national concern, like the Act of State Doctrine is involved.

Tabacalera Serveriano Jorge, S.A. v. Standard Cigar Co., 392 F.2d at 714–15 (citations omitted).

45. The Court in *Shaffer* eschewed a traditional mechanistic approach to jurisdiction in favor of standards based on rationality and fairness to the parties. *See generally* von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1164 (1966).

46. The sovereign's reach is also limited by the Sabbatino amendment which makes the act of state doctrine inapplicable to controversies involving confiscated goods which have entered the United States. *See* note 4 *supra*.

47. 462 F.2d 1021 (5th Cir.), *cert. denied*, 409 U.S. 1060 (1972). The character of the problem is really no more difficult for intangibles such as trademarks and patents than it is for debts and accounts receivable. Thus, the act of state doctrine would be effective to transfer a patent or trademark to a sovereign where the patent or trademark was registered and developed entirely within its territory. The situs of trademarks figured prominently in earlier *Dunhill* related litigation. F. Palicio y Compañía v. Brush, 256 F. Supp. 481 (S.D.N.Y.), *aff'd mem.*, 375 F.2d 1011 (2d Cir. 1966), *cert. denied*, 389 U.S. 830 (1967). In *Palicio*, the court concluded, *inter alia*, that Cuba's purported expropriation of trademarks was not effective to deprive the former owners of their rights because the trademarks were registered in the United States and, therefore, had their situs there at the time of the intervention. *Id.* at 488.

United States by the former owners of a Cuban brewery, where the Castro government had confiscated the brewery's assets and dissolved the corporation. The circuit court suggested that the territorial restriction is particularly relevant in the case of intangible assets. In interpreting the language of the *Restatement (Second) of Foreign Relations Law of the United States*,[48] the court stated that the requirement that the act be fully executed within the sovereign state necessitates complete "dominion [by the foreign state] over the property in question." [49] The court also relied on its earlier holding in a *Dunhill*-related trademark case, *Tabacalera Severiano Jorge, S.A. v. Standard Cigar Co.*,[50] which held that the foreign act needed to "come to complete fruition within the dominion of [the foreign] government," [51] in other words, that the sovereign be "physically in a position to perform a *fait accompli*" [52] in its confiscation. The court's discussion strongly implied that in general the foreign state is limited to the exercise of dominion over real property located within its territory[53] because as regards intangible property "the Act of State itself remains incomplete in the absence of acquiescence by the forum state." [54]

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48. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, § 43 Comment (a) (1965).

49. 462 F.2d at 1025 n.3. In particular, Judge Wisdom noted that this full execution requirement does not refer to "the documentary execution of whatever legal action the foreign state takes toward the property or its own national." *Id.*

50. 392 F.2d 706 (5th Cir. 1968).

51. *Id.* at 715–16.

52. *Id.* at 715. A problem arises when an act completed within foreign territory is nullified by a subsequent event in another country. Such was the case in *Sabbatino*, where the foreign state was the party suing because an American broker had not paid Cuba for the proceeds of expropriated property. Justice Harlan refused to attribute significance to the party alignment, largely because he sought to avoid encouraging self-help measures on the part of former owners. 376 U.S. at 437–38. The logic of the United States amicus brief, however, is better in keeping with the greater concern of territorial sovereignty:

> [T]his is not truly a case in which the act of state doctrine is being used by Cuban interests as a weapon for obtaining the assistance of our courts in effectuating the nationalization. The sugar was in Cuban territory. Nationalization was complete, and legal title to both the sugar and bills of lading was fully vested in the Cuban government before they left Cuba. . . . So long as all the acts necessary to vest title and possession are complete, the reasons for the act of state doctrine require its full application regardless of which party is plaintiff and which party is defendant.

Amicus Brief for the United States at 23–24, Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964), *reprinted in* 2 INT'L LEGAL MATS. 1009, 1017 (1963).

53. The exceptions for intangibles would apply where the trademarks or patents were registered and developed in the foreign state or where the defendant possesses a bank account within the territory.

54. Maltina v. Cawy Bottling Co., 462 F.2d at 1028. Judge Tuttle in *Tabacalera* concluded:

> The underlying thought expressed in all the cases touching on the Act of State Doctrine is a common-sense one. It is that when a foreign government performs an act of state which is an accomplished fact, that is when it has the parties and the

[redacted] by the Second Circuit in *Republic of Iraq* has been given expanded meaning in order to preclude the finding of situs of intangibles within the foreign state and thereby deny the application of the act of state doctrine. Federal courts, as the Fifth Circuit suggested, should "take a pragmatic view of what constitutes an extraterritorial action by a foreign state."[55] Indeed, it would be desirable for courts to continue to apply such a strict test to insure that a foreign confiscation is fully [redacted] within the foreign state before allowing the protection afforded by the act of state doctrine.

### *The* "Bernstein *Exception" and Executive Suggestion*

The act of state doctrine reflects in part a desire of the judiciary to avoid interfering with foreign relations matters constitutionally delegated to the executive branch.[56] The Department of State has, on several occasions,[57] advised courts that foreign relations considerations do not necessitate application of the doctrine, giving rise to the problem of whether the courts should give effect to such pronouncements and not apply the doctrine where they otherwise would.

The *"Bernstein* exception," which some courts have invoked to deny foreign sovereigns act of state protection on the basis of executive suggestion, takes its name from a well-known series of cases in which compensation was sought for Nazi expropriations prior to World War II.[58] The Second Circuit ultimately held that courts can examine the acts of a foreign sovereign within its own territory if advised by the Executive that foreign relations did not require the act of state doctrine

*res* before it and acts in such a manner as to change the relationship between the parties touching the *res*, it would be an affront to such foreign government for courts of the United States to hold that such act was a nullity. Furthermore, it is plain that the decisions took into consideration the realization that in most situations there was nothing the United States courts could do about it in any event. 392 F.2d at 715.

55. Maltina v. Cawy Bottling Co., 462 F.2d at 1027.

56. First National City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 767–68 (1972) (Rehnquist, J.); United States v. Curtiss-Wright Corp., 229 U.S. 304, 319–20 (1936). For more extensive discussion of this question, see note 3 *supra*.

57. *E.g.*, Letters from the State Department featured prominently in a number of cases. Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschaapij, 210 F.2d 375 (2d Cir. 1954) (per curiam), *modifying* 173 F.2d 71 (2d Cir. 1949) (the landmark case initiating the doctrine of deference to the Executive); First National City Bank v. Banco Nacional de Cuba, 406 U.S. 759 (1972); Banco Nacional de Cuba v. Farr, 272 F. Supp. 836 (S.D.N.Y. 1965), *aff'd*, 383 F.2d 166 (2d Cir. 1967), *cert. denied*, 390 U.S. 956 (1968).

58. Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschaapij, 173 F.2d 71 (2d Cir. 1949), *modified*, Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschaapij, 210 F.2d 375 (2d Cir. 1954); Bernstein v. Van Heygen Freres Societe Anonyme, 163 F.2d 246 (2d Cir. 1947).

to be applied; thus, in view of a pronouncement to that effect by the State Department, the plaintiff was allowed to prevail.[59]

The question of the *Bernstein* exception was met directly[60] by the Supreme Court in *First National City Bank* v. *Banco Nacional de Cuba* (*Citibank*).[61] Justice Rehnquist, writing for a three-justice plurality,[62] found the *Bernstein* exception dispositive. He viewed the act of state doctrine primarily as a means to avoid embarrassing the Executive in its conduct of foreign relations and concluded that this required deference to the State Department.[63]

The future of the *Bernstein* exception, however, was seriously put in doubt because six Justices in *Citibank*'s other three opinions specifically criticized the exception.[64] In particular, Justice Brennan, writing for the four dissenters,[65] noted that impairment of the Executive's conduct of foreign relations was but one concern of the act of state doctrine. He wrote that *Sabbatino* had held that the validity of a foreign act of state was a "political question" not cognizable in our courts."[66] Justice Brennan argued that following the *Bernstein* precedent would force the judiciary into "blind adherence" to executive policy, thereby politicizing the courts and undermining respect for the rule of law.[67] Thus, although *Citibank* was remanded on the basis of the *Bernstein* exception, the vitality of an exception to the act of state doctrine based on executive suggestion was suspect.

With *Dunhill*, the entire Court apparently disposed of the possibility

59. Initially, recovery was denied on the basis of the act of state doctrine. Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschaapij, 173 F.2d 71 (2d Cir. 1949); Bernstein v. Van Heygen Freres Societe Anonyme, 163 F.2d 246 (2d Cir. 1947). Nevertheless, dicta indicated that if the Executive were to advise the court that no foreign relations considerations required the application of the doctrine, the court could examine the Nazi acts. This opened the way for the Executive to indicate in the final suit that it felt that the act of state doctrine need not be applied. Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschaapij, 210 F.2d 375 (2d Cir. 1954).

60. In *Sabbatino*, the Court expressly refused to rule on the *Bernstein* exception, 376 U.S. at 426, but it seemed clear that a policy of absolute deference to the Executive was incompatible with Justice Harlan's formulation of the act of state doctrine. First National City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 773 (1972) (Powell, J., concurring); Metzger, *The State Department's Role in the Judicial Administration of the Act of State Doctrine*, 66 AM. J. INT'L L. 94, 98–99 (1972).

61. 406 U.S. 759 (1972).

62. Justice Rehnquist's opinion was joined by Chief Justice Burger and Justice White. Justices Douglas and Powell concurred in two separate opinions and Justice Brennan's dissenting opinion was joined by Justices Stewart, Marshall, and Blackmun.

63. 406 U.S. at 765–68.

64. *Id.* at 772–73 (Douglas, J., concurring); *id.* at 773 (Powell, J., concurring); *id.* at 782–93 (Brennan, J., dissenting).

65. *Id.* at 776 (Brennan, J., dissenting).

66. *Id.* at 787–88.

67. *Id.* at 790. Justice Brennan also noted that the avoidance of embarrassment to the Executive depended upon a guess as to a court's holding on the validity of foreign acts. *Id.* at 782–85.

of any formal obligation to defer to executive suggestion. There, the State Department had written a letter to the Solicitor General[68] declaring that the Executive did not believe the case raised act of state issues, because the act in question was "commercial and not public in nature."[69] While four Justices reached this same conclusion,[70] no member of the Court suggested that the executive determination was conclusive. Indeed, Justice Marshall noted that the fact that these Justices did not rely on the letter was consistent with the rejection of the *Bernstein* doctrine by the six Justices in *Citibank*.[71] At the same time, it should be emphasized that, as in *Dunhill*,[72] the views of the State Department are likely to carry considerable weight with the Court in the future. In addition, it is possible that in considering the past acts of extant or unrecognized states, the *Bernstein* doctrine may still be applicable.[73]

Unlike the other problems addressed in this comment, *Bernstein* is the subject of an extensive literature.[74] For reasons fully explained by other commentators,[75] rejection of the *Bernstein* exception is long overdue. Like the Foreign Immunities Act of 1976, which severely limits the role of the State Department in sovereign immunity cases,[76]

68. Letter from Monroe Leigh, Legal Advisor, Department of State, to the Solicitor General (Nov. 26, 1975), *reprinted in* 425 U.S. at 707 as Appendix I.

69. *Id.* at 707.

70. *See* 698 & note 78 *infra*.

71. 425 U.S. at 724–25 (Marshall, J., dissenting).

72. It is noteworthy that part III of Justice White's opinion which endorses the commercial exception, discussed in the next section, is replete with references to the Executive's position on the proper judicial role in act of state and sovereign immunity cases. 425 U.S. at 695–706. Indeed, two policy statements of the government are appendixed to the opinion. *Id.* at 706–15.

73. Banco Nacional de Cuba v. Sabbatino, 376 U.S. at 428; *see* note 3 *supra*. *But see* Borchard, *The Unrecognized Government in American Courts*, 27 AM. J. INT'L L. 261 (1932). For a review of cases dealing with unrecognized foreign sovereigns, see H. BRIGGS, THE LAW OF NATIONS 99–121 (2d ed. 1952); N. LEECH, C. OLIVER & J. SWEENEY, THE INTERNATIONAL LEGAL SYSTEM 767–830 (1973).

74. For commentaries on the problem of executive suggestion, see Delson, *The Act of State Doctrine — Judicial Deference or Abstention?*, 66 AM. J. INT'L L. 82 (1972); Lowenfeld, *The Act of State Doctrine and the Department of State:* First National City Bank v. Banco Nacional de Cuba, 66 AM. J. INT'L L. 795 (1972); Metzger, *supra* note 60; Norton, *Reflections on the Act of State Doctrine — A Fifth Wheel in the Conflict-of-Laws*, 10 HOUS. L. REV. 1 (1972); *Sabbatino's Progeny: The Act of State Doctrine, the Stevenson Letter, and Foreign Policy in the Courts*, 66 PROC. AM. SOC'Y INT'L L. 121 (1972); Note, 14 HARV. INT'L L.J. 131 (1973); Note, *Executive Suggestion and Act of State Cases: Implications of the Stevenson Letter in the* Citibank *Case*, 12 HARV. INT'L L.J. 557 (1971); Note, 86 HARV. L. REV. 284 (1972).

75. For the most penetrating commentaries, see Delson, *supra* note 74, and Lowenfeld, *supra* note 74.

76. For an analysis of the Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94–583, 90 Stat. 2891, see Maier, *The Proposed Sovereign Immunities Act: Its Effect on Judicial Deference*, [1976] PROC. AM. SOC'Y INT'L L. 48, 50; Martin, *Sovereign Immunity — Limits of Judicial Control*, 18 HARV. INT'L L.J. 429 (1977).

this development can be viewed as a reaffirmation of the independent role of the judiciary. From a doctrinal perspective, it represents a recognition of the fact that avoidance of conflict with the Executive is but one of the bases of the act of state doctrine.

### *The Commercial Act Exception*

Recently, the Supreme Court considered a general exception to the act of state doctrine for the commercial acts of foreign sovereigns. In *Dunhill,* a letter from the State Department urged that the act of state doctrine should not be applied to foreign acts which are "commercial and not public in nature." [77] Not regarding the letter as conclusive, Justice White's opinion,[78] nonetheless, endorsed this exception independently and sought to apply it to Cuba's repudiation of the obligation to repay *Dunhill.*[79]

Acknowledging the State Department's position, Justice White concluded that the ills which the act of state doctrine seeks to alleviate, primarily embarrassment to the Executive in the conduct of foreign relations, would more likely result "if we were to require that the repudiation of a foreign government's debts arising from its operation of a purely commercial business be recognized as an act of state and immunized from question in our courts." [80] Justice White took note of the increasing participation of foreign states in international commerce and argued that the risk of antagonizing foreign sovereigns by adjudicating their commercial disputes was far less than by subjecting their public governmental acts to scrutiny under an international law standard.[81] He suggested that judicial review of commercial acts would not create the international problems likely to ensue from review of the public governmental acts precluded by *Sabbatino.*

Justice White relied heavily on an analogy to the doctrine of sovereign immunity, which no longer shields foreign sovereigns in cases arising out of commercial transactions.[82] He also noted other instances in which courts have distinguished between the private commercial

77. 425 U.S. at 707.

78. Justice Stevens did not join this part of Justice White's opinion, adhering only to the limited holding that an act of state had not taken place.

79. 425 U.S. at 705.

80. *Id.* at 698.

81. *Id.*

82. *Id.* at 698–705. Before the passage of the Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94–583, 90 Stat. 2891, enacted subsequent to the Supreme Court's decision in *Dunhill,* the source for this restrictive theory was the "Tate Letter." Letter from Jack B. Tate, Acting Legal Advisor, Department of State, to Philip B. Perlman, Acting Attorney General (May 19, 1952), *reprinted in* 26 DEP'T STATE BULL. 984–85 (1952), *also reprinted in* 425 U.S. at 711 as Appendix II.

and the public governmental acts of states.[83] These cases, which involved states of the United States, stand for the proposition that when a state engages in those commercial activities usually undertaken by private enterprise, it divests itself of its sovereignty *pro tanto*.

Justice Marshall, in dissent, questioned the wisdom of articulating a broad exception to the act of state doctrine inconsistent with the case-by-case approach of *Sabbatino*.[84] He wrote that a commercial exception to the doctrine, like the restrictive theory of sovereign immunity, would be difficult to apply.[85] Moreover, Justice Marshall criticized Justice White's reliance on aspects of the law of sovereign immunity by contrasting its function to that of the act of state doctrine. [redacted] Marshall noted that sovereign immunity is concerned with the status of a party to a law suit and serves only to exempt a foreign state from suit. On the other hand, the act of state doctrine, which exempts no one from the process of the courts, determines what law to apply in dealing with the validity of a foreign act.[86] Finally, Justice Marshall argued that a commercial exception would not apply to the facts of *Dunhill* because "Cuba retained the money in the course of its program of expropriating what it viewed as part and parcel of the business."[87]

[redacted] White's proposed analysis would apparently involve an examination of the objective nature of the foreign sovereign's acts and make the act of state doctrine inapplicable to those activities typically engaged in by private individuals. Such a distinction, however, is problematic;[88] it does not necessarily follow from the commercial nature of an act that a foreign sovereign's purpose was commercial. For example, if a hostile government asserting a public purpose defaults on a loan from an alien, this commercial act should no more be exempted from the act of state doctrine than an obviously political expropriation of that alien's property for the same purpose.

It could be argued that Justice White's proposed commercial exception simply removes commercial acts from those actions regarded as acts of state.[89] Such a conclusion, however, would be an exercise in

83. 425 U.S. at 695–96 (quoting Bank of the United States v. Planters' Bank of Georgia, 22 U.S. (9 Wheat.) 904, 907 (1824) and Ohio v. Helvering, 292 U.S. 360, 369 (1934)).

84. *Id.* at 728 (Marshall, J., dissenting).

85. *Id.* at 728 n.14 (citing Victory Transport, Inc. v. Comisaria General, 336 F.2d 354, 359–60 (1964)).

86. *Id.* at 725–28. Justice White's analogy to sovereign immunity is also criticized in *The Supreme Court, 1975 Term*, 90 HARV. L. REV. 56, 273–75 (1976).

87. 425 U.S. at 729 (Marshall, J., dissenting).

88. *See* Victory Transport, Inc. v. Comisaria General, 336 F.2d 354, 359–60 (2d Cir. 1964); Lauterpacht, *The Problem of Jurisdictional Immunities of Foreign States*, 28 BRIT. Y.B. INT'L L. 220 (1951). *But see* Leigh & Sandler, Dunhill: *Toward a Reconsideration of* Sabbatino, 16 VA. J. INT'L L. 685 (1976).

89. The act of state doctrine does not apply to all foreign acts. As discussed previously,

semantics which ignores the ramifications of such a role. It is unlikely that a foreign sovereign will not be affronted by judicial review of its acts because a United States court chooses to label them "commercial." This likelihood suggests the inappropriateness of Justice White's reliance on those judicial precedents for a commercial/governmental distinction which concerned aspects of the federal system unrelated to foreign relations.

As a departure from the case-by-case approach of *Sabbatino*, Justice White's commercial exception would, in theory, preclude judicial abstention in a case where embarrassment to a foreign state and/or to the executive branch appears certain despite the commercial nature of the act in question. Furthermore, it would distract courts from the task of weighing such factors as possible interference with foreign relations and non-justiciability, which form the basis of the act of state doctrine, by forcing them to concentrate on the difficult task of determining the nature of alleged acts of state.

Alternatively, the commercial nature of a particular act of state might be taken into account within the framework of the traditional case-by-case approach. Generally, such a factual situation could be recognized as weakening the justifications for applying the doctrine by suggesting a lesser concern for possible conflict with the Executive, potential embarrassment to the foreign state, standards for adjudication, and certainty of title. Thus, if the Supreme Court feels compelled to take formal account of the commercial nature of certain foreign acts, it could adopt a rule that would put a burden on parties claiming protection from the act of state doctrine to present compelling reasons why the doctrine should be applied to a particular commercial act. To its benefit, such a procedural, evidentiary device would be less of a departure from *Sabbatino*'s case-by-case approach than Justice White's commercial exception would be. But courts are particularly ill-suited to evaluate the commercial versus the public goals of government. The application of a variable standard where the court would address

extraterritorial decrees will be enforced only if United States public policy permits; the same rule applies to foreign judgments and various types of administrative decisions. On the other hand, foreign penal and revenue laws will never be enforced in United States courts. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 41 (1965); *see* Breckenridge, *Non-Recognition of Foreign Abandonment Decrees in United States Adoption Proceedings*, 18 HARV. INT'L L.J. 137 (1977); Cohen, *Non-enforcement of Foreign Tax Laws and the Act of State Doctrine: A Conflict in Judicial Foreign Policy*, 11 HARV. INT'L L.J. 1 (1970); Leflar, *Extra-State Enforcement of Penal and Governmental Claims*, 46 HARV. L. REV. 193 (1932); Reese, *The Status in this Country of Judgments Rendered Abroad*, 50 COLUM. L. REV. 783 (1950); Stoel, *The Enforcement of Foreign Non-Criminal Penal and Revenue Judgments in England and the United States*, 16 INT'L & COMP. L.Q. 663 (1967). *Compare* Note, *A New Approach to the Act of State Doctrine: Turning Exceptions into the Rule*, 8 CORN. INT'L L.J. 273 (1975) *with* Wright, *Reflections on the* Sabbatino *Case*, 59 AM. J. INT'L L. 304 (1965).

the individual motives of the foreign sovereign could lead to a manipulation of inferences in order to satisfy particular policy objectives in a particular case. In view of the above considerations, it appears that any formal recognition of the commercial nature of a foreign act would unjustifiably complicate the already complex act of state analysis mandated by *Sabbatino*.

### *The Counterclaim Exception*

Uncertainty exists with regard to the circumstances in which courts may refuse to apply the act of state doctrine to counterclaims asserted against foreign sovereigns suing in United States courts. In [redacted],[90] a [redacted] majority of the Supreme Court, in three divergent opinions, refused to apply the doctrine to a defendant's limited counterclaim against a foreign sovereign. Justice Rehnquist, joined by Chief Justice Burger and Justice White, found the *Bernstein* exception dispositive and, therefore, allowed the counterclaim because the Executive had indicated that the act of state doctrine need not be applied in the case.[91] Justice Rehnquist, however, never decided whether a counterclaim would be allowed in the absence of executive suggestion.

[redacted] Douglas, concurring, found neither *Bernstein* nor *Sabbatino* controlling, and instead analogized to the doctrine of sovereign immunity[92] concluding that because "Cuba is the one who asks our judicial aid in collecting its debt . . . 'fair dealing' requires recognition of a counterclaim or set-off that eliminates or reduces that claim."[93] If the amount of the counterclaim exceeds the asserted claim, Douglas wrote that *Sabbatino* would control since affirmative recoveries would raise "political questions" resulting in "ideological and political clashes between nations which must be resolved by the other branches of government."[94] Justice Powell, the fifth member of the majority, argued for a more flexible approach to the act of state doctrine. Envisioning a greater role for the courts than delineated by Justice Harlan in *Sabbatino*, Justice Powell wrote that he was "not prepared to say

90. First National City Bank v. Banco Nacional de Cuba, 406 U.S. 759 (1972). First National City Bank sold the collateral securing a loan of $10 million to the government-owned Banco Nacional de Cuba in response to Cuba's nationalization of its Cuban branches. When Banco Nacional subsequently sued for the excess proceeds realized from the sale, Citibank counterclaimed for equal damages resulting from the expropriation.

91. *Id.* at 768.

92. *Id.* at 772 (Douglas, J., concurring in result). Justice Douglas relied on National City Bank v. Republic of China, 348 U.S. 356 (1955), which held that when a foreign sovereign sues in United States courts, it waives its defense of sovereign immunity to counterclaims up to the amounts of its own claims.

93. 406 U.S. at 772 (Douglas, J., concurring).

94. *Id.*

that international law may never be determined and applied by the judiciary where there has been an 'act of state.' "[95] In the *Citibank* case, it appeared to Justice Powell that an exercise of jurisdiction to hear the counterclaim would not interfere with delicate foreign relations considerations and thus not present a conflict between the roles of the judiciary and the political branches.[96] He concluded that in such a case "the courts have a duty to determine and apply the applicable international law" to the counterclaim.[97]

Justice Brennan, joined by the three other dissenters, argued that the act of state doctrine applies equally to counterclaims. He argued that *Sabbatino* had refused to attribute significance to a foreign sovereign's status as plaintiff;[98] that by seeking relief on an equitable claim unrelated to an act of state, the foreign sovereign does not waive the protection of the act of state doctrine;[99] and that it would be anomalous to rest the application of the doctrine on the size of the counterclaim, the result of following Justice Douglas' approach.[100] Justice Brennan also pointed out that a counterclaim exception could result in windfalls for owners of expropriated property who had unrelated claims brought against them by foreign states.[101] Thus, although the *Citibank* case was remanded for consideration of the counterclaim, given the vigorous dissent and the fragmentation of the majority, uncertainty existed at the time of *Dunhill* as to the parameters of a defendant's right to counterclaim on the basis of a foreign act of state.

The *Dunhill* litigation not only presented the general problem of counterclaims again, but it raised the issue of whether a defendant could be awarded an affirmative judgment through judicial examination of a foreign act of state.[102] The district court, having found no act of state in the interventors' repudiation, allowed the affirmative recovery.[103] The Second Circuit, however, found that the interventors' refusal did constitute an act of state and disallowed the counterclaim to

95. *Id.* at 775 (Powell, J., concurring in judgment). Justice Powell indicated his dissatisfaction with *Sabbatino*, writing that had he been a member of the Court at the time of that case, he probably would have joined Justice White's dissent. *Id.* at 774.

96. *Id.* at 775–76.

97. *Id.* at 776.

98. *Id.* at 795 (Brennan, J., dissenting) (quoting Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 437–38 (1964)).

99. *Id.* at 794 (Brennan, J., dissenting) (citing Note, 75 HARV. L. REV. 1607, 1619 (1962)).

100. *Id.* at 778.

101. *Id.* at 794.

102. Dunhill had paid for pre-intervention shipments in an amount in excess of its current liability, and thus sought an affirmative recovery from the interventors.

103. Menendez v. Faber, Coe & Gregg, 345 F. Supp. 527 (S.D.N.Y. 1972), *modified sub nom.* Menendez v. Saks & Co., 485 F.2d 1355 (2d Cir. 1973), *rev'd sub nom.* Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 (1976).

[redacted] extent that it exceeded the interventors' claim.[104] In so doing, the court concluded that *Citibank* had authorized a *limited* counterclaim, but that there was no precedent for an affirmative judgment.[105]

[redacted] majority of the Supreme Court in *Dunhill* found insufficient evidence of an act of state and thus did not consider the applicability of the act of state doctrine to an affirmative recovery. In dissent, however, Justice Marshall, having found an act of state in Cuba's repudiation of its obligation to repay the pre-intervention payments, argued that no significant distinction exists between an affirmative recovery for the excess of a counterclaim over a foreign sovereign's principal claim and an ordinary affirmative judgment, which would be barred by the act of state doctrine.[106]

Noting that the *Citibank* dissent would preclude defendant's counterclaim per se,[107] Justice Marshall advanced further grounds for denying affirmative recoveries. He concluded that "an affirmative judgment offends the policy of judicial abstention from interference with foreign relations to an equal degree, whether it is founded upon a naked suit against a foreign state or an excessive counterclaim."[108]

Exempting counterclaims, particularly those in excess of the original claim, from the act of state doctrine would establish the type of "inflexible and all-encompassing rule" that *Sabbatino* specifically sought to avoid.[109] Like other general exceptions to the act of state doctrine, a counterclaim exception ignores the changing calculus of considerations that characterize act of state cases. The dissenting opinions in *Citibank* and *Dunhill* maintain theoretical consistency and maximum judicial flexibility. Indeed, Justice Marshall's compelling opinion in the most recent case demands a reappraisal of the result in *Citibank* for, if *Sabbatino* precludes an affirmative judgment on a counterclaim, it would be anomalous for *limited* counterclaims to be allowed because of the insignificant fact that the amount of the original claim is greater.

### *Conclusion*

The complex factual situations in post-*Sabbatino* act of state cases have led United States courts to refine elements of the act of state doctrine as well as to reconsider the soundness of the reasoning underlying *Sabbatino*. [redacted] recent history of judicial limitations and exceptions to the doctrine indicates that the Burger Court is intent on limiting the

104. Menendez v. Saks & Co., 485 F.2d 1355 (2d Cir. 1973), *rev'd sub nom.* Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 (1976).
105. *Id.* at 1373.
106. 425 U.S. at 733 (Marshall, J., dissenting).
107. *Id.*
108. *Id.* at 734.
109. 376 U.S. at 428.

[redacted] afforded foreign sovereigns [redacted] while tightening [redacted] requirements with respect to requisite sovereign authority and situs may be seen as definitional in nature because they are but refinements in the act of state doctrine, the allowance of set-offs, the possibility of affirmative recoveries from counterclaims, and the proposed commercial exception of Justice White all demonstrate the Court's displeasure with the implications of *Sabbatino*. The demise of the *Bernstein* exception represents an affirmation of the independent role of the judiciary in applying the act of state doctrine.

What is needed is not a departure from *Sabbatino*'s recognition of the need for case-by-case determinations, but the development of rational and fair standards that promote judicial consistency in act of state cases without limiting the courts' flexibility to deal with particularly sensitive controversies. The courts should apply a territorial restriction to the doctrine. However, a rule that limits the applicability of the act of state doctrine to acts executed within the territory of the foreign sovereign encounters difficulty when what is expropriated is intangible property backed by assets outside the territory. In view of the artificiality involved in attributing a situs to such property, United States courts should refuse extraterritorial enforcement of such a taking of intangible property on the ground of public policy. In addition to the needed refinement of the concept of territoriality, it is appropriate for the courts to define evidentiary standards for proving the sovereign authority behind a purported act of state, so long as the doctrine itself is not undermined.

Exceptions that make the act of state doctrine inapplicable to counterclaims or "commercial" acts are of a markedly different nature. Neither of these conclusive exceptions is consonant with *Sabbatino*. For act of state purposes, the fortuity of party alignment should not matter. In view of this, the Supreme Court should refuse to infer from *Citibank* an unqualified counterclaim exception. Similarly, there should be no exception for commercial acts. Justice White's proposed commercial exception would unjustifiably distort present act of state analysis. In particular, it would be unresponsive to the need for judicial flexibility in considering the effect to be given foreign acts. Indeed, it was this need coupled with the requirement of judicial independence which led to the demise of the *Bernstein* doctrine under which courts bound themselves to executive suggestions in act of state cases.

110. Of the remaining members of the *Sabbatino* Court, Justices Brennan, Stewart, and Marshall, dissenters in both *Citibank* and *Dunhill*, have opposed all the attempts to retreat from *Sabbatino*, while Justice White, *Sabbatino's* sole dissenter, joined the plurality opinion in *Citibank* and wrote for the Court in *Dunhill*. Of the Nixon appointees, Chief Justice Burger and Justices Powell and Rehnquist were in the majority in both *Citibank* and *Dunhill*, while Justice Blackmun joined the dissent in both cases. Justice Stevens concurred only in the limited holding in *Dunhill*.